

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: February 26, 1996

TO : Sandra Dunbar, Acting Regional Director
Region 3

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: TNT Red Star Express, Inc.
Case 3-CA-19698

512-5036-6720-6300
512-0125-7500
512-5036-6720-5900

This Section 8(a)(1) case is submitted for advice as to whether the employer violated the Act by discharging its terminal manager, a Section 2(11) supervisor, when, after he had finally acquiesced to the Employer's demand that he terminate an employee for an unlawful reason, the supervisor disclosed the true reason for the discharge to the alleged discriminatee.

FACTS

TNT Red Star Express, Inc. (Employer) operates a trucking terminal whose employees are represented by Teamsters, Local 118 (Union). During midterm contract negotiations, the Employer requested that the start-time provisions of the contract be modified. One of the Employer's casual drivers named Hayes unsuccessfully ran against the current Union officers in a recent election. The Union agreed to modify the start-time provisions if the Employer agreed to discharge Hayes. The Employer then informed its terminal manager Zakofsky¹ of the nature of the Union's request and asked Zakofsky to terminate Hayes. Zakofsky objected to the proposed discharge of Hayes, but nevertheless terminated Hayes for the pretextual reason that Hayes had damaged a truck in a minor accident.² At the

¹ The Region has concluded that Zakofsky is a Section 2(11) supervisor and has not submitted this issue for advice.

² Related charges were filed by Hayes in Cases 3-CB-6894 and 3-CA-19739 alleging that the Union violated Section 8(b)(1)(A) and (2) of the Act by demanding Hayes' termination as a condition for the Union agreeing to contract modifications, and that the Employer violated Sections 8(a)(1) and (3) of the Act by acceding to this

time that Zakofsky discharged Hayes, Zakofsky informed Hayes of the Employer's real reason for discharging him. When the Employer found out what Zakofsky had done, it terminated Zakofsky for the alleged reason that Zakofsky had failed to report the accident in which Hayes had damaged the truck. The Region found that the Employer's discharge of Zakofsky was pretextual, and that the Employer's real reason for discharging him was that he had informed Hayes about the unlawful reason for Hayes' discharge.

ACTION

We conclude that a Section 8(a)(1) complaint should issue, absent settlement, in that the Employer discharged the supervisor Zakofsky for refusing to commit an unfair labor practice.

In Parker-Robb Chevrolet,³ the Board overruled a line of cases in which it had previously found that the discharge of a statutory supervisor violated Section 8(a)(1) of the Act if it had constituted an "integral part" or "pattern of conduct" of employer activity intended to discourage the Section 7 activity of its statutory employees. The Board further stated that, notwithstanding the general exclusion of supervisors from coverage under the Act, the discharge of a supervisor may violate Section 8(a)(1) in circumstances where such a finding is necessary "to vindicate employees' exercise of their Section 7 rights." *Id.* at 403. The Board stated that all supervisory discharge cases may be resolved through the following analysis:

The discharge of supervisors is unlawful when it interferes with the right of employees to exercise their rights under Section 7 of the Act, as when they give testimony adverse to their employers' interest or when they refuse to commit unfair labor practices.
The discharge of supervisors as a result of their participation in union or concerted activity - either

demand. The Region has already determined that complaint should issue in these cases and has not submitted them for advice.

³ *Id.*

by themselves or when allied with rank-and-file employees - is not unlawful for the simple reason that employees, not supervisors, have rights protected by the Act. Id. at 404. (emphasis added)

The Board has long held that it is an unfair labor practice for an employer to discharge a supervisor for refusing to commit an unfair labor practice.⁴

In the instant case, we conclude that the Employer violated Section 8(a)(1) of the Act by discharging supervisor Zakofsky for refusing to commit an unfair labor practice.⁵ The Employer had instructed Zakofsky to fire Hayes for the pretextual reason that he had damaged a truck in an accident. Although Zakofsky fired Hayes, he did not fire Hayes, as instructed by the Employer, for the pretextual reason. Instead, Zakofsky informed Hayes of the Employer's unlawful reason for terminating Hayes' employment. In doing so, Zakofsky refused to carry out the unlawful discharge of Hayes as instructed by the Employer.

When the Employer learned that Zakofsky had discharged Hayes and informed him of the real reason for his discharge, the Employer fired Zakofsky allegedly for failing to report Hayes' minor accident. The Region found, and we agree, that the Employer's asserted reason for

⁴ Vail Manufacturing Company, 61 NLRB 181 (1945), enfd. 158 F.2d 664, 666-667 (7th Cir. 1947); Inter-City Advertising Company of Greensboro North Carolina, Inc., 89 NLRB 1103 (1950), enforcement denied sub nom. Inter-City Advertising Co. of Charlotte, N.C., 190 F. 2d 420 (4th Cir. 1951); Jackson Tile Manufacturing Company, 122 NLRB 764 (1958); Miami Coca Cola Bottling Company d/b/a Key West Coca Cola Bottling Company, 140 NLRB 1359 (1963); Belcher Towing Company, 238 NLRB 446 (1978), enfd. 614 F.2d 88 (5th Cir. 1980); Talladega Cotton Factory, Inc., 106 NLRB 295 (1953), enfd. 213 F.2d 209, 215-217 (5th Cir. 1954).

⁵ See cases cited in footnote 5 above. See Phoenix Newspapers, 294 NLRB 47 (1989), where the Board found that the employer unlawfully discharged a supervisor for refusing to create a false record to justify the unlawful discharge of an employee.

firing Zakofsky was pretextual. Rather, the real reason for the Employer's termination of Zakofsky was because he refused to commit the unfair labor practice, as instructed, by the Employer.

Therefore, we conclude that a Section 8(a)(1) complaint should issue against the Employer, absent settlement.

The Board's decisions in Buddies Super Markets⁶ and Pontiac Osteopathic Hospital⁷ do not require a contrary result. In Buddies, the Board held that the Employer's discharge of a supervisor violated Section 8(a)(1) of the Act under the "integral part" or "pattern of conduct" test. There the employer discharged the supervisor, because the supervisor had informed an employee that the employer was "building a case" against the employee due to the employee's prior union activity. The Board held that "there is little difference between a supervisor refusing to engage in unfair labor practices and refusing to stand by in silence while his employer embarks on a planned course of action toward that end."⁸ In Parker-Robb, the Board stated that it was overruling Buddies to the extent that it was inconsistent with its decision.⁹

In Pontiac Osteopathic Hospital, the Board further clarified its view of Buddies. In Pontiac Osteopathic Hospital, the Board held that the employer did not violate the Act by discharging a supervisor who refused to support management by expressing her view that the discharge of an employee was unwarranted. There the supervisor was not asked to unlawfully discharge an employee or otherwise commit an unfair labor practice. The Board stated that "there is no need to protect the supervisor from coercion when the supervisor is acting on his or her own initiative."¹⁰ In noting that Buddies had been overruled,¹¹

⁶ 223 NLRB 950 (1976).

⁷ 284 NLRB 442 (1987).

⁸ Id., fn 2.

⁹ Parker-Robb, above, fn. 20, 404.

¹⁰ Pontiac Osteopathic Hospital, above, at 443.

that Board stated that "it is the need to ensure that statutorily excluded employees are not coerced into violating the law ... that compels protection for supervisors."¹² The Board then held that since the supervisor in Pontiac Osteopathic Hospital was in no way coerced into violating the law her discharge was not a violation of the Act.

Buddies and Pontiac Osteopathic Hospital are factually distinguishable from the instant case, because in those cases the employer did not ask and was not expecting the supervisor to commit an unfair labor practice. In Buddies, the supervisor was never requested to commit an unfair labor practice and the employee, that was the object of the proposed discrimination, was never discharged. In Pontiac Osteopathic Hospital, the employee was discharged, but the supervisor was never requested to commit an unfair labor practice and did not discharge the employee. In the instant case, however, the supervisor did not act on his own initiative, but was coerced by the Employer into committing the unfair labor practice. It was only after discharging the employee that the supervisor informed the discriminatee of the Employer's real motives. We conclude, therefore, that Buddies and Pontiac Osteopathic Hospital do not preclude finding a violation in the instant case.

Accordingly, a Section 8(a)(1) complaint should issue against the Employer, absent settlement.

B.J.K.

¹¹ Id., fn. 6.

¹² Id.